UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LISA MARDEN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 00-238-B***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff, who suffers from myofascial pain syndrome,[2] is capable of returning to past relevant work as a cashier/checker or a waitress. I recommend that the decision of the commissioner be vacated and the case remanded for further proceedings not inconsistent herewith.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had myofascial pain syndrome, an

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[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on March 21, 2002, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

[2] "'[M]yofascial pain syndrome' is defined as irritation of the muscles and fasciae (membranes) of the back and neck causing chronic pain (without evidence of nerve or muscle disease)." *Mondragon v. Apfel*, 3 Fed. Appx. 912, 915 n.1 (10th Cir. 2001) (citations

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impairment that was severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record at 19; that her statements concerning her impairment and its impact on her ability to work were not entirely credible, Finding 4, *id*.; that she lacked the residual functional capacity ("RFC") to lift and carry more than twenty pounds or more than ten pounds on a regular basis, Finding 5, *id*.; that her impairment did not prevent her from returning to her past relevant work as a cashier/checker and waitress, Finding 6, *id*.; and that she therefore had not been under a disability at any time through the date of decision, Finding 7, *id*.[3] The Appeals Council declined to review the decision, *id*. at 6-7, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge in this case reached Step 4 of the sequential process, at which stage the claimant bears the burden of proof of demonstrating inability to return to past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). At this step the commissioner must make findings of the plaintiff's RFC and the physical and mental demands of past work and determine whether the plaintiff's RFC would permit performance of that work. 20

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and internal quotation marks omitted).

[3] The plaintiff remained insured, for purposes of SSD, through the date of decision, *see* Record at 14, 20; thus, there was no need for a separate analysis of her level of disability through her date last insured.

C.F.R. §§ 404.1520(e), 416.920(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service* Rulings 1975-1982 ("SSR 82-62"), at 813.

The plaintiff complains that the administrative law judge (i) lacked sufficient evidence to find that she retained the RFC for the full range of light work, misinterpreting or ignoring important medical evidence, (ii) failed to include important limitations in hypothetical questions to the vocational expert, and (iii) erred in his assessments of her credibility and pain severity. Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 7) at 2-10. I am persuaded that on the first two bases, remand is warranted.

I. Discussion

At oral argument, counsel for the plaintiff highlighted a particular asserted flaw in the administrative law judge's formulation of her RFC: that he simply chose to ignore limitations on her ability to reach found by two non-examining Disability Determination Services ("DDS") physicians and examining consultant Gina S. Gomez, M.D.

Both Dr. Diane Richardson (in an RFC assessment dated May 7, 1998) and Lawrence P. Johnson, M.D. (in an RFC assessment dated August 28, 1998) checked a box indicating that the plaintiff's ability to reach in all directions (including overhead) was "limited" as the result of left shoulder and/or neck pain. Record at 238, 258. Dr. Richardson noted, "no constant overhead reaching on rt," while Dr. Johnson commented, "no constant above chest level work." *Id*. Dr. Gomez also indicated that the plaintiff's ability to reach was affected by her impairment, although she qualified this finding with the notation that it was based on the plaintiff's subjective complaints and she had found no pertinent findings on examination. *Id*. at 319.

As counsel for the plaintiff pointed out at oral argument, the administrative law judge never discussed the DDS or Gomez limitations on lifting (or, for that matter, addressed the asserted lifting

restriction at all). *See* Record at 14-18. Such an error, in itself, would not be fatal were there clearly substantial evidence of record supporting a finding that no such lifting limitation exists. *See, e.g., Bryant ex rel. Bryant v. Apfel*, 141 F.3d 1249, 1252 (8th Cir. 1998) ("We have often held that [a]n arguable deficiency in opinion-writing technique is not a sufficient reason for setting aside an administrative finding where . . . the deficiency probably ha[s] no practical effect on the outcome of the case.") (citations and internal quotation marks omitted).

However, in this case, I find only one RFC assessment of record arguably constituting "positive evidence" that the plaintiff suffered from no lifting restrictions: a report dated June 14, 1996 by independent medical examiner Thomas F. Shields, M.D., who examined the plaintiff incident to a then-pending workers' compensation claim. *See* Record at 171, 174-79. Dr. Shields essentially found no restrictions (on reaching or otherwise), noting, "I find no reason why her work capacity should have any restrictions except for the reasons mentioned previously, that of her [diminutive] size and the amount of force she needs to use to handle patients." *Id*. at 178. Yet, as noted by plaintiff's counsel at oral argument, the Shields opinion turned on his finding that the plaintiff "ha[d] not presented any objective sign of any significant problem." *Id*. As Dr. Shields further explained: "The cervical spine examination and neurological examination have proven to be normal. There is nothing to see, feel, touch, or measure. In view of the normal findings otherwise, and the normal findings in the scapula itself, I do not find that there is any evidence of any significant disability with whatever complaints she has." *Id*. at 179.

Critically, the Shields opinion that the plaintiff had no medically determinable impairment was contradicted by other evidence of record indicating that she did suffer from myofascial pain syndrome – a diagnosis that the administrative law judge chose to credit. *See, e.g., id*. at 15.[4] There is a

[4] The plaintiff's myofascial pain syndrome is traced to an incident on October 18, 1995 in which she was attacked by a resident at the
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seeming logical inconsistency in determining that a claimant suffers from a medically determinable impairment and then relying on a finding of lack of functional restriction arrived at on the basis that no medically determinable impairment was found to exist. Such an inconsistency cries out for satisfactory explanation (assuming that any is possible); but the administrative law judge in this case offers none. Under the circumstances, the Shields report cannot alone stand as substantial evidence in support of the administrative law judge's implicit finding that the plaintiff's myofascial pain syndrome imposed no limitation on her ability to reach.

This error in turn filtered through to, and undermined, the testimony of vocational expert Warren Maxim concerning the plaintiff's ability to return to past relevant work. It is bedrock Social Security law that the responses of a vocational expert are relevant only to the extent offered in response to hypotheticals that correspond to medical evidence of record. *Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982).[5]

Turning briefly, for the benefit of the parties, to the plaintiff's remaining points of error:

1. **Headaches**. The plaintiff points out that, although the administrative law judge stated that she suffered from "frequent, intractable headaches," he nonetheless surprisingly found that these headaches imposed no limitation whatsoever on her ability to perform the full range of light work. Statement of Errors at 2. The administrative law judge devoted one paragraph to discussion of this topic, writing: "Ms. Marden has complained of occasional headaches. A CT scan of her head done in September, 1996 was normal (Exhibit 7F). The evidence does indicate that the claimant has frequent,

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nursing home where she worked. *See* Record at 34, 174. The resident squeezed her shoulders so tightly in a bear hug that she temporarily lost consciousness. *See id*. After missing some work, *id*. at 175, the plaintiff returned to light duty until that job was terminated in April 1996, *id*. at 44-45. At that time, she declined to accept a job offered to her on the 3-11 p.m. shift. *Id*. at 171-72. In 1997 the plaintiff received a lump-sum settlement in a workers' compensation claim stemming from this incident. *Id*. at 45, 106-08.

[5] The administrative law judge relied on Maxim's testimony that a person with the RFC to do light work could perform work as a waitress and cashier/checker. *Id*. at 18, 57. The waitress position, which Maxim testified corresponded with section 311.477-030 of the *Dictionary of Occupational Titles* (U.S. Dep't of Labor, 4th ed. 1991) ("DOT"), *id*. at 54, requires frequent reaching, DOT § 311.477-030. Maxim offered no DOT citation for the cashier/checker position; however, the plaintiff points out that a position listed in

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intractable headaches, and the undersigned does not find that this is a 'severe' impairment." Record at 16. The final sentence, on its face, is absurd: How could "frequent, intractable" headaches be "non-severe" in the *de minimis* sense envisioned at Step 2 of the sequential-evaluation process? While it may be (as counsel for the commissioner suggested at oral argument) that the discussion contains a typographical error, the commissioner owes it to this claimant to provide a satisfactory explanation.

2. **Mental Impairment**. The plaintiff complains that the administrative law judge relied on, but misconstrued, a psychological evaluation by Willard Millis Jr., Ph.D., which Maxim interpreted as imposing potentially significant vocational limitations. Statement of Errors at 2-3. I disagree. In his evaluation, Dr. Millis noted, *inter alia*:

> . . . She reports a number of symptoms of depression, but the primary one seems to be her sense that her life is totally out of control and she is not the manager of anything. As she described this situation she began to cry and talked about her irritability and temper problems, as well as some other issues. She seems to have an erratic appetite, sleep difficulties, a sense of hopelessness and despair, and again her sense of being overwhelmed by her physical difficulties. . . .

Record at 223-24. Nonetheless, he went on to conclude:

> . . . From a functional perspective, she would seem to be capable of understanding fairly detailed instructions. Although no formal cognitive testing was completed, it is felt that she probably is operating in the low-average range. Her memory, both remote and recent would appear to be intact. She does not appear to have any particular problems with concentration, persistence, or pace based upon her description of her daily activities and involvement in life's demands. Social skills are well within normal limits. . . .

Id. at 224.

At hearing, Maxim testified that, although Dr. Millis did not specifically address work capacity, the psychological state he described "would have a detrimental impact certainly on her chances of success in returning to either sedentary or light work," possibly precluding return to her past relevant work. *Id*. at 58. However, the administrative law judge accurately described the Millis

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the DOT as "cashier-checker" is described as entailing constant reaching. Statement of Errors at 3; DOT § 211.462-014.

report as finding "no significant functional limitations resulting from the claimant's mental state." *Id.* at 16. Maxim was not an expert in psychology or psychiatry, and the administrative law judge was not obliged to agree with his interpretation of Dr. Millis's report.[6]

3. **Credibility and Pain Determinations.** The plaintiff complains that the administrative law judge "gave no useful explanation or findings for how the evidence demonstrated a lack of credibility," Statement of Errors at 7, and, in a related error, failed to evaluate her subjective complaints of pain in accordance with *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19 (1st Cir. 1986), *id*. at 8-10. She contends, *inter alia*, that the administrative law judge wrongly failed to credit the RFC assessment of Dr. Gomez, which she asserts was uncontradicted by other evidence of record. *Id*. at 9-10. However, contrary to the plaintiff's contentions, the administrative law judge gave a detailed explanation for his credibility findings, in the process touching on factors relevant (per *Avery*) to assessment of subjective complaints of pain. *See* Record at 16-18. Determinations pursuant to *Avery* – as well as credibility assessments in general – are entitled to deference when so supported. *See, e.g., Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987) ("The credibility determination by the ALJ, who observed the claimant, evaluated his demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings.").[7]

In this regard, I note that even though the administrative law judge did find the plaintiff to be suffering from myofascial pain syndrome – a condition that provides an objective medical basis for

[6] In fact, two non-examining DDS consultants completed Psychiatric Review Technique Forms ("PRTFs") in which, after reviewing the Millis report, they judged the plaintiff's mental impairment to be non-severe. *See* Record at 226-27 (PRTF by Brenda Sawyer, Ph.D. dated April 10, 1998), 246-47 (PRTF by David R. Houston, Ph.D., dated July 21, 1998).

[7] In assessing credibility and pain, the administrative law judge relied partly on Drs. Shields' and Gomez's lack of finding of objective medical evidence supporting the plaintiff's claims of pain. *See* Record at 18. This finding seemingly is in tension with the administrative law judge's determination that the plaintiff did suffer from a medically determinable impairment, myofascial pain syndrome. Nonetheless, the pain and credibility findings are not *per se* reversible inasmuch as the administrative law judge detailed a number of other reasons (for which there is support in the Record) why he discounted the plaintiff's claimed magnitude of symptomatology. *See*

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claimed pain – he was not therefore obliged to accept wholesale her testimony regarding the severity of her pain and functional limitations. *See, e.g.*, *Mondragon*, 3 Fed. Appx. at 916 ("Because plaintiff's myofascial pain syndrome is an impairment that could reasonably be expected to produce disabling pain, the ALJ was required to determine whether he believed plaintiff's assertion of severe pain, in light of all the relevant objective and subjective evidence."). For these reasons, the Gomez RFC assessment, which states that it is predicated entirely on the plaintiff's subjective complaints of pain, Record at 317-20, is less helpful to the plaintiff than she asserts. To the extent the administrative law judge permissibly discounted the plaintiff's subjective complaints, he was entitled to discount the Gomez RFC report.

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and **REMANDED** for proceedings not inconsistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 26th day of March, 2002.

David M. Cohen
United States Magistrate Judge

id. at 17-18.

PORTLD ADMIN

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-238

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LISA MARDEN FRANCIS JACKSON, ESQ.

plaintiff [COR LD NTC]

JACKSON & MACNICHOL

85 INDIA STREET

P.O. BOX 17713

PORTLAND, ME 04112-8713

207-772-9000

DANIEL W. EMERY, ESQ.

[COR NTC]

36 YARMOUTH CROSSING DR

P.O. BOX 670

YARMOUTH, ME 04096

(207) 846-0989

v.

SOCIAL SECURITY ADMINISTRATION JAMES M. MOORE, Esq.

COMMISSIONER [COR LD NTC]

defendant U.S. ATTORNEY'S OFFICE

P.O. BOX 2460
BANGOR, ME 04402-2460
945-0344

ESKUNDER BOYD, ESQ.
[COR LD NTC]
ASSISTANT REGIONAL COUNSEL
OFFICE OF THE CHIEF COUNSEL,
REGION 1
2225 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
617/565-4277